

FEDERAL COURT OF AUSTRALIA

DHZ16 v Minister for Immigration and Border Protection [2017] FCA 1491

Appeal from: Application for extension of time: *DHZ16 v Minister for Immigration & Anor* [2017] FCCA 1016

File number: QUD 283 of 2017

Judge: **DOWSETT J**

Date of judgment: 13 November 2017

Catchwords: **MIGRATION** – application for an extension of time in which to seek leave to appeal from the Federal Circuit Court – decision to refuse a protection visa – where the applicant had provided a bogus document within the meaning of s 91WA of the *Migration Act 1958* (Cth) – application dismissed

Legislation: *Migration Act 1958* (Cth) ss 5, 91WA
Federal Court Rules 2011 (Cth) r 40.43, Sch 3 item 15(b)

Date of hearing: 13 November 2017

Registry: Queensland

Division: General Division

National Practice Area: Administrative and Constitutional Law and Human Rights

Category: Catchwords

Number of paragraphs: 25

Counsel for the Applicant: The Applicant appeared in person

Solicitor for the First Respondent: Ms L Helsdon of Sparke Helmore

Counsel for the Second Respondent: The Second Respondent submits to any order of the Court, save as to costs

ORDERS

QUD 283 of 2017

BETWEEN: **DHZ16**
 Applicant

AND: **MINISTER FOR IMMIGRATION AND BORDER**
 PROTECTION
 First Respondent

ADMINISTRATIVE APPEALS TRIBUNAL
Second Respondent

JUDGE: **DOWSETT J**

DATE OF ORDER: **13 NOVEMBER 2017**

THE COURT ORDERS THAT:

1. 1. the application for an extension of time in which to seek leave to appeal be dismissed; and
2. 2. the applicant pay the respondent's costs fixed in the amount of \$1,756.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

DOWSETT J:

1 1 Following the hearing of this application, I dismissed it but did not publish reasons. I now do so.

THE APPLICANT'S CLAIM

2 2 In these proceedings the applicant seeks an extension of time in which to appeal against a decision of a Judge of the Circuit Court, refusing judicial review of a decision by the second respondent (the "Tribunal"). By that decision, the Tribunal affirmed an earlier decision by a delegate (the "delegate") of the first respondent (the "Minister"). The Tribunal has indicated that it will submit to any order made by the Court, save for any order as to costs.

3 3 The applicant is a citizen of Bangladesh. He left Bangladesh on 20 February 2013 and, on 12 June 2014, applied, in this country, for a protection visa. At para 51 of its reasons, the Tribunal set out the delegate's summary of the applicant's case:

- • He became a supporter of the Bangladesh National Party (BNP) during the 2006-2008 caretaker government period as suppliers to new mattress business were BNP supporters.
- • The applicant claims he is a strong believer in Islam and believed BNP was key in protecting Bangladesh's conservative traditional values. By supporting the BNP he was also able to get better contracts with other BNP supporters.
- • The applicant regularly attended meetings and canvassed in support of the BNP in the lead up to the 2008 elections.
- • After the election the Awaini League (AL) started harassing BNP members. The applicant was a known BNP business owner and was asked to provide money to the AL in order to continue to operate his business. He was able to pay so did.
- • In mid-2012 the AL began to arrest Jamaat-e-Islami members. Riots and protests erupted. Despite this the applicant continued to attending meetings, donating money and attending strikes.
- • In October 2012 two AL members called Johor Shaab and Amir Ali approached the applicant's store. He was told to cease his BNP membership or pay two lakh taka within three days.
- • The applicant was told by higher level BNP individuals to close his shop for a week. Re-opened his business after the week had passed.

- • On 30 October 2012 approximately 8 AL supporters arrived at the applicant's shop and asked for the two lakh taka again. The applicant was beaten when he said he couldn't pay. They had knives and metal rods and beat applicant until he was unconscious.
- • The applicant woke up in Homna hospital where he had been taken by locals. His shop had been looted and his property damaged.
- • After two weeks in hospital the applicant returned to his home village in Charajapur. He engaged police who didn't listen. He was abused for attempting to make complaint against AL and told to leave premises.
- • The applicant was told by local villagers that the AL was searching for him - he believed they only knew shop address though. He feared that the police or other locals had given them his address.
- • The applicant relocated to Nimtulli, Chittagong, Chittagong District/Division. He had no income so worked as a casual construction labourer. He lived discretely as he feared further harm.
- • On 15 November 2012 the AL attended the applicant's family home. They destroyed his property. The applicant feared they would find him.
- • He contacted a people smuggler and left Bangladesh on 20 February 2013.
- • As he left in rush the applicant was unable to pay creditors so they have begun to harass his family to make repayments. He fears they will become violent.
- • The applicant fears being harmed, abused, abducted and/or killed by ruling party AL and its supporters.
- • The applicant fears harm for his political opinion, and for his membership of the particular social group BNP members who are business owners.
- • Due to the data breach by the department in February 2014 he is at a heightened risk of being harmed if he returns to Bangladesh. He fears being approached by the Bangladeshi government and will know he has applied for a PV in Australia.

THE TRIBUNAL'S DECISION

4 4 The applicant failed in the Tribunal because it formed the view that he had provided to it a bogus document. Pursuant to s 91WA of the *Migration Act 1958* (Cth) (the "Migration Act"):

- (1) The Minister must refuse to grant a protection visa to an applicant for a protection visa if:
 - (a) the applicant provides a bogus document as evidence of the applicant's identity, nationality or citizenship; or

- (b) the Minister is satisfied that the applicant:
 - (i) has destroyed or disposed of documentary evidence of the applicant's identity, nationality or citizenship; or
 - (ii) has caused such documentary evidence to be destroyed or disposed of.
- (2) Subsection (1) does not apply if the Minister is satisfied that the applicant:
 - (a) has a reasonable explanation for providing the bogus document or for the destruction or disposal of the documentary evidence; and
 - (b) either:
 - (i) provides documentary evidence of his or her identity, nationality or citizenship; or
 - (ii) has taken reasonable steps to provide such evidence.
- (3) For the purposes of this section, a person provides a document if the person provides, gives or presents the document or causes the document to be provided, given or presented.

5 5 The term “bogus document” is defined in s 5 of the Migration Act as follows:

bogus document, in relation to a person, means a document that the Minister reasonably suspects is a document that:

- (a) purports to have been, but was not, issued in respect of the person; or
- (b) is counterfeit or has been altered by a person who does not have authority to do so; or
- (c) was obtained because of a false or misleading statement, whether or not made knowingly.

6 6 In support of his application the applicant provided a birth certificate which, he said, had been emailed to him by his parents in Bangladesh. He said that the birth certificate was at his home when he re-located to Nimtulli and other locations. The birth certificate bore a registration date of 5 June 2013, some months after his departure from Bangladesh on 20 February 2013, so that it could not have been at his home at the time of his departure. It bore an issue date of 21 July 2013, again well after his departure from Bangladesh. The Tribunal indicated to him that it might have difficulty in accepting that his parents had sent him a birth certificate which was at his home when he left Bangladesh. He responded by asserting that he had asked his parents to send him a copy of the birth certificate which he had left at his home. The Tribunal then informed him that it had been unable to verify the certificate by reference to the “Online Birth Registration Information System” (the “BRIS”) of Bangladesh.

The register showed no entry matching the identification number and date on the document provided to the Tribunal by the applicant.

7 7 It seems that in May 2014, UNICEF had reported that the Bangladeshi government expected that all manually recorded birth data would be migrated to the online system by the end of 2014. There was also country information, indicating that document fraud is widespread in Bangladesh, and that bogus documents are easily obtained.

8 8 The Tribunal put to the applicant that the information concerning the provenance of his birth certificate was relevant to its review in that it might lead it to conclude that the document was a bogus document, and that, if it reached that conclusion, the Migration Act would require that his application be refused. He was invited to comment or to request further time in which to respond. He indicated that he was ready to provide his comments, and suggested that his parents may have been unable to find his existing birth certificate and had obtained a new certificate. He said that the earlier certificate may not have been included in the BRIS, presumably because of its age. It was pointed out that no earlier certificate had been provided, and that the only certificate in question was the certificate said to have been recently obtained online from his parents. He said that he had told his parents that if they could not find his existing certificate, they should arrange for a new certificate.

9 9 The applicant said that he had, on arrival in Australia, told the Department that he calculated his year of birth as being about 1988. The date on the certificate was 1989. The Tribunal seems not to have treated the discrepancy as being significant. The applicant said that he could make no further comment concerning the circumstances in which he provided the certificate, save that his parents had obtained it. The Tribunal asked why he had said, at the beginning of the hearing, that his parents had sent a certificate which had been at home when he left, given that he now said that he had asked them to obtain and forward a copy. He said that the discrepancy as to his year of birth may have created the problem. He was asked how that discrepancy could have led him to say that an existing certificate, and not a new copy had been provided. He said that initially, his parents had not told him that they had obtained a new certificate. He was asked why he had not said, at the beginning of the hearing, that his parents had told him that they had obtained a new certificate. He said that he had not understood the question asked of him at that time.

10 10 At para 39 the Tribunal concluded:

The Tribunal finds that the birth certificate provided to the Department was not issued by the authorities in Bangladesh. Given the UNICEF report, the Tribunal would have expected the applicant's birth certificate to be capable of verification online using the BRIS website. The Tribunal was unable to verify the birth certificate. No explanation has been provided as to why the applicant's birth certificate would not have been capable of verification using the BRIS website. The applicant submitted that a birth certificate issued before he departed from Bangladesh might not be included on the online system, but this is not the birth certificate that was provided to the Department. The birth certificate provided to the Department was issued on 21 July 2013, several months after the applicant had departed from Bangladesh. The country information indicates that document fraud is widespread and bogus documents are easily obtainable in Bangladesh. In these circumstances, the Tribunal finds that the birth certificate purports to have been, but was not, issued in respect of the applicant as contemplated by paragraph (a) of the definition of 'bogus document' and that such a document is a 'bogus document' for the purposes of that definition in s.5(1) of the [Migration Act].

11 11 The Tribunal then went on to consider whether or not the applicant had provided a reasonable explanation for providing the bogus document or causing it to be supplied. At paras 41-42 the Tribunal said:

41. The explanation put forward by the applicant at the hearing was that his parents had obtained the birth certificate which he provided to the Department. However, the Tribunal found the applicant's evidence in relation to how the birth certificate was obtained to be highly unreliable. The applicant stated three times at the beginning of the hearing that his parents had emailed him a birth certificate which had been at his home prior to his departure from Bangladesh. It was only after the Tribunal explained the consequences in terms of his visa application potentially being refused that the applicant amended his account to say that his parents had been unable to find the earlier certificate and had obtained a new one. However, the applicant subsequently conceded that his parents had told him that they had obtained a new birth certificate at some point prior to the hearing.
42. The applicant provided two explanations as to why he initially gave an incorrect account as to how the birth certificate he provided to the Department was obtained:
 - • Firstly, he stated that this was due to the discrepancy between the date of birth he gave at the entry interview and that contained on his birth certificate. He stated that the date contained on his birth certificate was correct. The Tribunal finds explanation this [sic] to be implausible. The Tribunal does not consider that the earlier discrepancy would have interfered with the applicant's ability to describe how he obtained his birth certificate. The Tribunal considers the applicant's lengthy pause before providing this explanation telling.
 - • Secondly, the applicant stated that he could not follow the questions at the beginning of the hearing. The Tribunal also finds this explanation to be implausible. The question as to how he obtained the birth certificate provided to the Department was a very

simple one, and it was asked several times. On each occasion, he gave an answer which was responsive to the question.

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12 12 The Tribunal concluded at paras 43-47:

43. There is no evidence before the Tribunal that the applicant ever had an earlier birth certificate issued to him. The date of registration on the birth certificate provided to the Department indicates that his birth was not registered until 5 June 2013. If his parents had obtained a new birth certificate because they could not find the old one, the Tribunal would have expected the registration date to have been prior to the applicant's departure from Bangladesh, even if the date of issue was after his departure.
44. The Tribunal also considers it pertinent to note that the birth certificate which was provided to the Department was in Bengali, a language which the applicant stated in his protection visa application that he was able to speak, read and write. The applicant initially gave an account as to how the birth certificate was obtained to the Tribunal which was inconsistent with the face of the certificate. As noted above, he persevered with this account until he realised it was untenable, whereupon he revised his account. The Tribunal has found the applicant's reasons for not providing the revised account from the outset to be implausible.
45. Given the unreliability of the applicant's evidence, the Tribunal does not accept the applicant's explanation provided at the hearing that the birth certificate was obtained by his parents. In the absence of any other explanation, the Tribunal does not accept the provision of the bogus document was an "innocent, unintended or accidental matter".
46. Having rejected the explanation provided by the applicant, the Tribunal finds that the applicant does not have a reasonable explanation for providing a bogus document. Accordingly, it is unnecessary for the Tribunal to address the issue of whether the applicant has provided documentary evidence of his identity, nationality or citizenship, or has taken reasonable steps to provide such evidence.
47. By way of summary, the Tribunal is satisfied that the applicant has presented a bogus birth certificate as evidence of his identity. However, the Tribunal is not satisfied that the applicant has a reasonable explanation for providing a bogus document to the Department. Accordingly, consistent with s.91WA of the [Migration Act], the Tribunal must affirm the decision to refuse to grant the applicant a protection visa.

(Footnotes omitted.)

13 13 Those findings effectively led to the conclusion that the Tribunal could not uphold the applicant's claim to a protection visa. Nonetheless it went on to consider the bases for his claim, summarizing them at para 51 (set out above). The Tribunal did not accept much of his evidence. At paras 85-88, it concluded:

85. Based on the independent information in relation to returnees and political

opponents, the Tribunal does not accept that there is a real chance or risk that the applicant will be harmed if he is returned to Bangladesh as a failed asylum seeker. While the information indicates that the applicant's identification would have to be verified before he returned, there is nothing to suggest that he would [sic] arrested upon arrival because he left Bangladesh without a passport or as a failed asylum seeker more generally.

86. While the Tribunal has some doubts, the Tribunal accepts that the applicant was a victim of extortion in his home village. The applicant's claims are consistent with the independent information relating to extortion cited in the delegate's decision.
87. The Tribunal accepts that the applicant faces a real chance of persecution at the hands of AL extortionists in the reasonably foreseeable future in his home district.
88. The Tribunal also accepts that there are substantial grounds for believing that as a necessary and foreseeable consequence of the applicant being removed from Australia to Bangladesh that there is a real risk that he will suffer significant harm in his home district at the hands of AL extortionists.

14 14 The Tribunal went on to reject his claim that if he returned to Bangladesh he would engage actively in politics so as to attract the attention of the Awaini League (“AL”). It further rejected his claim that the AL would have any motive to pursue him outside of his local district in areas where he “has no profile” and given the time which has passed since he was last in his local district. At paras 93 the Tribunal concluded:

Considering the independent country information and their individual circumstances, the Tribunal finds that it would be reasonable for the applicant to relocate to an area of the country where there would not be a real risk that he will suffer significant harm and that 36(2B)(a) applies in his case. Accordingly, the Tribunal finds that that are not substantial grounds for believing that as a necessary and foreseeable consequence of the applicant being removed from Australia to Bangladesh that there is a real risk that he will suffer significant harm.

15 15 As a result, the Tribunal concluded that it was not satisfied that Australia had protection obligations to the applicant, either as a refugee or pursuant to the complementary protection provisions.

THE CIRCUIT JUDGE’S DECISION

16 16 The applicant applied to the Federal Circuit Court for review of that decision. The Circuit Judge found that the Tribunal’s conclusion concerning the birth certificate was available on the evidence, and that no other conclusion was open to it.

THE APPLICATION FOR AN EXTENSION OF TIME

17 17 The applicant did not file a notice of appeal within the prescribed time which expired on 6 June 2017. However he filed the present application on 8 June 2017. The applicant claims that he received incorrect advice as to the appeal time limit. In those circumstances, I would normally grant an extension of time, provided that the applicant demonstrated a viable ground of appeal. The proposed grounds of appeal are:

1. The Administrative Appeals Tribunal's decision affected by jurisdictional error.

Particulars:

The Administrative appeals tribunal failed to consider a claims or integer of claims and failed to consider where applicant had a well-founded fear of persecution in the reasonable foreseeable future upon return to his own country or origin. The Tribunal had no jurisdictions to make such decision because its reasonable satisfaction was not arrived in accordance with the provisions of the Migration Act 1958. The Tribunal denied the applicant procedural fairness by reaching conclusions that the applicant is not a credible witness and his claims were implausible. the Tribunal member in his decision records did not ask any conventions relation questions whether the applicant had fear of persecution in his own country of residence.

2. The Administrative Appeals Tribunal made findings without evidence. The Administrative Appeals Tribunal rejected the applicant's evidence before the Tribunal and failed to believe the applicant as a credible witness, such failure constituted a breach of s 425 of the Migration Act 1958 (Cth).

Particulars:

The tribunal in her decision records and interview records failed to consider any evidence put by the applicant as credible, believable without any evidence. The honourable member has discredited the evidence just only the applicant's inability to remember or recall various issues and the dates at the time of hearing.

18 18 Apart from his affidavit dealing with the question of delay, the applicant also filed an affidavit in which he complained that the Circuit Judge:

- did not give any weight to "supporting documents"; and
- failed to uphold "my natural justice".

19 19 There is no demonstrated basis for the allegations that the Tribunal:

- failed to consider his claims;
- had no jurisdiction;

- • denied him procedural fairness; or
- • made findings without evidence.

20 20 As to the assertion that the Tribunal did not ask questions concerning the applicant's fear of persecution for a Convention reason, the Tribunal clearly understood that he claimed such fear. See the Tribunal's reasons at paras 68-75 and 86-88. In any event, the findings concerning the birth certificate effectively disposed of the matter.

21 21 There is no apparent basis for the applicant's assertion that the Circuit Court:

- • did not give weight to documents; or
- • failed to uphold his "natural justice".

22 22 Although the applicant complains about adverse findings as to his credit, he offers no argument in support of that complaint.

23 23 At the hearing before me, the applicant:

- • asked for "some extra time", without offering any reason for such request;
- • alleged that any "apparent error" in the birth certificate was not his fault; and
- • asserted that before the Circuit Court, his pro bono lawyer had not represented him properly and adequately.

24 24 None of those complaints takes the matter any further.

25 25 There is no reason to doubt the correctness of the Circuit Judge's conclusion that the Tribunal's finding concerning the document was fairly open to it. In those circumstances, no viable ground of appeal has been demonstrated. The application must be dismissed with costs. Pursuant to r 40.43 and item 15(b) of Sch 3 to the *Federal Court Rules 2011*, I fix costs in the amount of \$1,756.

I certify that the preceding twenty-five (25) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Dowsett.

Associate:

Dated: 8 December 2017